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In the Supreme Court of the United States

OCTOBER TERM, 1954

CIRACO MANEJA, ET AL., PETITIONERS

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED

WAIALUA AGRICULTURAL COMPANY, LIMITED,
PETITIONER

v.

CIRACO MANEJA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

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Washington 25, D. C.

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The Secretary of Labor, although not a party to this action, has a substantial interest in the case, since the decision below has, for all practical purposes, decided important questions of construction

of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 201) in a manner contrary to the interpretations of the Secretary of Labor, and, we believe, plainly inconsistent with the decisions of this Court, as well as in conflict with the rulings of another Court of Appeals.

Contrary to the statements in the opinion below (No. 357, App. 86), the Department of Labor was not a "bitterly partisan litigant" in this litigation, and the Department had nothing whatsoever to do with the institution of either the original action or the counterclaims, and it did not participate at all in either of the trial court proceedings. Because of the importance of the issues raised by the parties and decided by the trial court, the Secretary of Labor, in accordance with the usual procedure of the Department, filed a brief as *amicus curiae* when the case reached the Court of Appeals, with the permission of that court. Similarly, the present interest of the Secretary of Labor arises solely from the fact that the decision below has construed important provisions of an Act of Congress for the administration and enforcement of which the Secretary of Labor has primary responsibility.

Petitions for writs of certiorari have been filed by both the employee-defendants (No. 357) and the employer-plaintiff (No. 358). The petition on behalf of the employer seeks review only of the decision of the Court of Appeals dismissing its declaratory judgment action on jurisdictional grounds. It assumes that the decision below did not actually decide "the important issues of statu-

tory construction" on the merits, and suggests that the Court of Appeals be directed to determine them (No. 358, p. 12). The petition filed on behalf of the employees seeks review of the decision below insofar as it reversed the trial court's judgment in their favor and apparently ruled against them on the merits of their counterclaims.

It is difficult to determine from the opinion and orders of the court below just what issues were actually decided. The opinion is unclear and the court denied the Company's petition for rehearing, stating that no clarification was needed (No. 357, App. 107). The opinion denying the petition for rehearing did clearly state that the cause was "remanded with directions to dismiss Waialua's declaratory petition," and that the employees' cross-complaint "is left undismissed" (No. 357, App. 107). But this decision, as well as the court's prior opinion, seems to suggest that the employees' counterclaim should also be dismissed on the ground that "the entire cause was tainted by apparent collusion between the parties in the attempt to obtain an advisory opinion upon constitutional questions" (No. 357, App. 107-108, 85-86). Thus, the ruling below might be construed as deciding only that both the employer's action and the employees' counterclaim should be dismissed for want of jurisdiction because of their collusive nature. This is apparently the construction the Waialua Company's petition (No. 358) places on the decision. See also the Company's Brief in Opposition in No. 357, pp. 8-10.

However, it is apparent that the Court of Appeals was unwilling to stop with the jurisdictional ground in reversing the District Court's judgment in favor of the employees' counterclaim. It expressed in full its views on the merits of the employees' claims, including both the issues of coverage and of exemption under the Act. Indeed, its order for dismissal of the employer's action for lack of jurisdiction seems to be predicated, at least in part, on its view of the issues on the merits. For the court's criticism of the "agreement of all parties and the Department of Labor" that Waialua's employees are "engaged in commerce or in the production of goods for commerce" (No. 357, App. 84), and its conclusion that the action was "collusi[ve]" in an "attempt to obtain an advisory opinion upon constitutional questions" (No. 357, App. 107-108), seem to rest mainly on its belief that Waialua's whole enterprise is outside the scope of the Act because "agriculture is not commerce, interstate or foreign, nor does agriculture affect such commerce in a constitutional sense" (No. 357, App. 99).

The present status of the case is that the counterclaim of the employees has been "left undismissed," but the judgment of the trial court on the merits in their favor has been reversed and the cause remanded "for proceedings in accordance with the opinion of this court" (No. 357, App. 107, 106). And the "opinion of this court" states in no uncertain terms the appellate court's view that the employees' claims should be rejected on the

merits, so that there would seem little point either in this Court's remanding the case to the Ninth Circuit with directions "to review on the merits the important issues of statutory construction," as is suggested in the employer's petition (No. 358, p. 12), or in allowing the case to go back to the District Court to enter judgment in accordance with the unequivocal views on the merits expressed by the Court of Appeals. Whether or not the issues of statutory construction were technically decided by the decision below, those issues are necessarily presented if the decision is reversed on the jurisdictional issue, as the petition in No. 358 urges. To refer the issues on the merits to the Ninth Circuit again would, therefore, serve no purpose except unnecessarily to prolong this already too prolonged litigation, which has been going on for over seven years, having been before both the trial court and the Court of Appeals twice already.

The posture of the case, therefore, seems to warrant review of the issues on the merits at this time, if the Court feels that there is little substance to the charge of collusion. The views already unequivocally expressed on the merits by the Court of Appeals will undoubtedly be regarded as controlling by the District Courts in the Ninth Circuit and thus will directly obstruct enforcement in that region and will prevent uniformity of enforcement generally. Moreover, the issues on the merits are not only of immediate and large importance in the administration and enforcement of

the Act, but the views announced by the Ninth Circuit are, we believe, plainly inconsistent with this Court's decisions, and are in conflict with the holdings of the First Circuit.

1. The inconsistency of the opinion below with this Court's decision in *Farmers Reservoir and Irrigation Co.* v. *McComb*, 337 U.S. 755, is apparent from the face of the two opinions. Although it recognized that the *Farmers Irrigation* decision held that the production of agricultural crops is production of goods for interstate commerce within the meaning of the statutory language, the court below frankly rejected the decision as a precedent (No. 357, App. 101). Relying on *United States* v. *Butler*, 297 U. S. 1, 68, the court ignored the subsequent decisions of this Court which have repeatedly upheld the constitutional power of Congress under the commerce clause to regulate the production of agricultural commodities destined for interstate movement. See *Wickard* v. *Filburn*, 317 U.S. 111, 118; *Mulford* v. *Smith*, 307 U.S. 38; *Santa Cruz Fruit Packing Co.* v. *Labor Board*, 303 U.S. 453; *Mandeville Farms* v. *Sugar Co.*, 334 U.S. 219, 236-237. The opinion states flatly that "agriculture is not commerce, interstate or foreign, nor does agriculture affect such commerce in a constitutional sense. Most agricultural products eventually get into interstate transportation. But growing and harvesting of such products is not preparation of goods for commerce. * * * We hold that a farming operation such as growing

the crop or harvesting is not commerce" (No. 357, App. 99, 102).

Similarly, the construction by the court below of the "agriculture" exemption is patently inharmonious with this Court's views. The whole import of the *Farmers Irrigation* decision was that the agriculture exemption must be strictly limited to the operations specified in the statutory definition and is not to be extended to activities which, though "necessary" or even "indispensable" to the specified operations, were not actually a part of agricultural production itself. 337 U. S. at 759-760, 764, 766. Taking a diametrically opposite approach, the Ninth Circuit declares that the findings of the trial court were "clearly erroneous" because that court should have found that "all activities of Waialua upon the island of Oahu were concerned with growing, cultivating and harvesting sugar cane" (No. 357, App. 91), and that all of the employees' activities, "whether furnishing power to the mill or hauling cane from field to mill, fell within the express wording 'harvesting'" as used in the statutory definition (No. 357, App. 90). Thus, according to the Court of Appeals, not only the field workers engaged in plowing, planting, irrigating, harvesting, and other such farming operations should have been found to be engaged in "harvesting", but also railroad transportation employees such as locomotive engineers, section hands and locomotive repairmen, operating or maintaining Waialua's 56 miles of railroad track,

10 locomotives and 712 cane cars, mill employees engaged in processing the cane into raw sugar, and the welders, machinists, mechanics, blacksmiths, carpenters, etc., working in the separate machine and repair shops—although none of these latter groups of employees did any general farm work.

In short, the Court of Appeals concluded that the trial court erred in applying the principle of strict construction to this exemption. Instead, the appellate court reaffirmed its previously announced view that the "agriculture" exemption should be regarded as "remedial" with emphasis placed on "the breadth of the exclusion of agricultural workers" (No. 357, App. 88-89, citing *McComb* v. *Hunt Foods*, 167 F. 2d 905 (C.A. 9), certiorari denied, 335 U. S. 845). This doctrine of broad construction of an exemption from the coverage of the Fair Labor Standards Act is not only directly contrary to this Court's decision in the *Farmers Irrigation* case, relating specifically to the "agriculture" exemption, but is also out of step with the repeated and consistent rulings of this Court that "*any* exemption from such humanitarian and remedial legislation must * * * be narrowly construed" [emphasis supplied] (*Phillips Co.* v. *Walling*, 324 U. S. 490, 493; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617; *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 517).

2. The opinion below also conflicts with several decisions of the Court of Appeals for the First Circuit construing the "agriculture" exemption in relation to virtually identical situations in the

sugar industry in Puerto Rico. *Bowie* v. *Gonzalez*, 117 F. 2d 11; *Calaf* v. *Gonzalez*, 127 F. 2d 934; and *Vives* v. *Serralles*, 145 F. 2d 552.

In these three cases, the First Circuit held that the mill and railroad transportation employees of a sugar producing and processing enterprise are neither within the terms of or the reason for the "agriculture" exemption. The mill employees, said the First Circuit, "are typical factory workers or laborers engaged in maintaining industrial facilities." *Bowie* v. *Gonzalez*, 117 F. 2d at 18. And the employees "engaged in the operation, repair, and maintenance of the company railroad" are engaged in activities "incident to milling rather than to farming and therefore [are] not exempt under the Act." *Calaf* v. *Gonzalez*, 127 F. 2d at 936-937; *Vives* v. *Serralles*, 145 F. 2d at 554.

> The mere fact that in this case the owners of the farms are also the owners of the mill and the transportation facilities does not make transportation an incident to farming.
>
> * * * There seems no rational basis for saying that simply because the ownership of the mills and the farms is in the same hands that, therefore, those employees who are engaged in an activity which is separate and distinct from agriculture are exempt from the provisions of the Act. [*Calaf*, 127 F. 2d at 937-938.]

Contrary to the statement of the court below (No. 357, App. 96, fn.), these decisions cannot be distinguished on the ground that the milling and trans-

portation were "either cooperative enterprises or are done by some outside agency." In the *Calaf* case, the First Circuit expressly refused to base its decision on the fact that the railroad facilities were owned and used jointly by several growers, stating that "We place our decision * * * on the broader ground that the transportation * * * is incident to milling rather than to farming." 127 F. 2d at 936-937. Similarly, in the *Bowie* case, although some of the cane processed by defendant was grown by independent producers, the decision rested also on the independent ground that mill employees were "typical factory workers" outside the terms and intent of the exemption. (117 F. 2d at 18). And the last of the decisions (*Vives* v. *Serralles*), which reaffirmed the *Bowie* and *Calaf* decisions, involved a single business organization which, like the Waialua Company here, operated all the farm lands, the transportation facilities, and the mill.[1]

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[1] The Waialua Company's brief in opposition in No. 357 erroneously states that the views of the Department of Labor with respect to the interpretation of the agriculture exemption "represent a sharp departure from principles long followed by the Department" (Br. in Opp. p. 19, n. 14). In fact, the present views were adopted long before this case arose, and represent long-standing positions of the Department. Counsel for the Waialua Company rely on a provision of an Interpretative Bulletin issued in 1939. But in September 1941, the Administrator of the Wage and Hour Division issued a press release (1942 Wage Hour Manual p. 408) stating that in the light of the decision in *Bowie* v. *Gonzalez*, 117 F. 2d 11 (C.A. 1), it appeared "that the exemption for agricultural employees provided by the Wage and Hour Law does not apply to sugar mill employees, even if the only cane ground in such a mill is cane grown by the sugar mill owner on his own field," and that "the Wage and Hour Division went too far in expressing" such view

3. The importance of the coverage and exemption issues in relation to "agriculture", as defined in the Act, has already been recognized by this Court in granting the writ of certiorari in the *Farmers Irrigation* case, *supra*. Not only was the writ granted in that case in the absence of a conflict among the circuits, but this Court's view of the importance of the issues was emphasized by the particularly painstaking analysis made of the statutory definition of "agriculture" and of the limitations on the scope of the exemption. The opinion below brushes aside this Court's carefully reasoned decision on the curious premise that the exemption issue should never have been reached because there is neither statutory nor constitutional authority to regulate "agricultural pursuits" (*supra*, pp. 6-7).

The implications of the opinion below are much more far-reaching and important than the effects of the decision reviewed in the *Farmers Irrigation* case. If not reviewed by this Court, the opinion will undoubtedly be regarded as controlling by the District Courts in the Ninth Circuit. The immediate practical effect will be to deprive completely of the benefits of this Act thousands of employees in that Circuit, who, the Secretary of Labor believes, are entitled at least to the minimum wage

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in Interpretative Bulletin No. 14, issued in 1939. Thus, this view of the Administrator was adopted six years before the institution of this suit, which was instituted in 1947. Other modifications were adopted in 1943 and 1944 to accord with the decision in *Calaf* v. *Gonzalez*, 127 F. 2d 934 (C.A. 1).

benefits.[2] The employees affected are not only industrial workers in the sugar industry, but large numbers of employees engaged in similar operations related to other agricultural products such as fruits, vegetables, wheat, tobacco, etc. Since these operations are particularly extensive in the regions within the Ninth Circuit, the effect of the decision on these employees alone seems sufficient to warrant review. In addition, the ruling will interfere substantially with the uniform enforcement of the Act, resulting in unjustified competitive advantages for employers in this Circuit as well as causing confusion in other areas where there have not yet been authoritative court decisions on these issues.

Respectfully submitted,

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Solicitor General.

STUART ROTHMAN,
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United States Department of Labor.

OCTOBER 1954.

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[2] Some of such employees may be exempt from the overtime requirements of the Act under other exemptions.

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

QUESTIONS PRESENTED

The Secretary of Labor is primarily interested in the following questions and they are discussed in this brief:

1. Whether Waialua's employees engaged in growing the sugarcane, manufacturing the raw sugar, and operating the company's railroad and

service shops, are engaged in the "production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether employees engaged in operating the main-line railroad, in processing cane into raw sugar at the mill, or in providing repair and maintenance services for the mill and railroad, are employed in "agriculture" within the meaning of section 3 (f) of the Act, and are, therefore, exempted by section 13 (a) (6) from the minimum wage and overtime provisions of the Act.

(3) Whether employees engaged in operating and maintaining the main-line railroad, or in repairing and maintaining mill machinery during the off season, are exempt from the overtime provisions of the Act by virtue of the section 7 (c) exemption for the "processing" of sugarcane.

4. Whether employees who in the same workweek perform work, part of which is of the type described in sections 13 (a) (6) or 7 (c), and part of which is covered by the Act and not subject to any exemption, are exempt from the overtime requirements of the Act.

The parties have also briefed the additional questions of whether the District Court had abused its discretion in entertaining the declaratory judgment suit (employer's brief, pp. 25–33; employees' brief, pp. 23–28, 75–83) and whether the village maintenance employees were engaged in the "production of goods for commerce" (em-

ployer's brief, pp. 73–82; employees' brief, pp. 61–71). The Secretary agrees with the parties that the jurisdictional objection raised by the Court of Appeals is without substance, but since that issue is mainly of concern to these particular parties we do not brief it. The question of coverage of the village maintenance employees rests on the phraseology of section 3 (j) prior to its amendment in 1949 (R. 817). Inasmuch as the Department of Labor had expressed no opinion on that question, either prior to or during this litigation, no opinion is expressed herein.[1]

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 67–69.

STATEMENT

This litigation was instituted in April 1947. The procedural background is adequately set forth in the brief of Waialua, pp. 8–11.

The Secretary of Labor, although not a party to the action, has a substantial interest in the case, since the decision below has, for all practical purposes, decided important questions of construction of the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 201) in a manner contrary to the

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[1] Subsequent to the amendment of section 3 (j) in 1949, substituting "closely related" and "directly essential" for "necessary" in the definition of "produced," the Secretary of Labor expressed the opinion that such village maintenance employees would not be covered. 29 CFR Section 776.18 (b).

interpretations of the Secretary of Labor, and, we believe, plainly inconsistent with the decisions of this Court, as well as in conflict with the rulings of another Court of Appeals.

Contrary to the statements in the opinion below (R. 728), the Department of Labor was not a "bitterly partisan litigant" in this litigation, and the Department had nothing whatsoever to do with the institution of either the original action or the counterclaim, and it did not participate at all in either of the trial court proceedings. Because of the importance of the issues raised by the parties and decided by the trial court, the Secretary of Labor, in accordance with the usual procedure of the Department, filed a brief as *amicus curiae* when the case reached the Court of Appeals, with the permission of that court. Similarly, the present interest of the Secretary of Labor arises solely from the fact that the decision below has construed important provisions of an Act of Congress for the administration and enforcement of which the Secretary of Labor has primary responsibility. This Court in granting the writs of certiorari invited the participation of the Secretary of Labor as *amicus curiae* (R. 843, 814).

WAIALUA'S OPERATIONS

Waialua, the third largest producer of raw sugar in the Territory of Hawaii, is engaged in (1) growing and harvesting sugarcane, and

(2) processing such cane into raw sugar at its mill. It provides its own supporting railroad transportation, repair, maintenance, and other services. Waialua contends that the agriculture exemption of section 13 (a) (6) exempts *all* of its employees from both the minimum wage and overtime compensation provisions, and that the exemption in Section 7 (c) for "processing" sugarcane also exempts all of its employees, except those who work on the fields where the sugarcane is grown, from the overtime requirements of the Act. It employed 1,144 persons as of September 1946 (R. 36) over an area of 9,663 acres (R. 33). Their work and duties are described in the stipulation in detail (R. 27–128), which is summarized below as it relates to the issues herein discussed.

Farming.—In its farming activities, Waialua employs field workers who plow the land (R. 39–40; 191), plant the seed (R. 40–42), cultivate and fertilize the soil (R. 42–44), irrigate the land (R. 45–8, 308–10), and harvest the crop (R. 52–59; 193, 196). They also move the cut cane over portable track (R. 58–59; 198–201) to the company's main line railroad. Since cane is grown in Hawaii on a year around basis, "the cane lands are in various stages of production or preparation" (R. 35). The employees who work in the fields move from one area to another "depending upon the program of plowing, planting, irrigating, fertilizing, applying herbicides and insecticides, weeding and harvesting" (R. 35).

Manufacturing.—The District Court found that to carry on its function as a processor of sugar cane, Waialua operates and maintains a mill composed of a cane cleaning plant, a cane crushing room, a boiling room, and a bagging room (R. 760–1). The mill is an industrial type of facility located in the yard area separate and distinct from the growing fields (R. 721, 723; 66–82). In the cane cleaning plant Waialua's employees operate a series of machines connected by conveyors which receive the cane from the cars, wash off the dirt and mud, and then strip off the leaves (R. 66–72, 310). At the crushing plant, the cane passes under a set of revolving knives which chop it up; it then is crushed between a series of large steam-driven rollers (78″ wide and 39″ in diameter) to extract the juice from the fibre (R. 72–76, 313). The juice is pumped to the boiling house while the remaining cane fibre (called "bagasse") moves by conveyor to the fire room where it is used as fuel in the generation of steam and electricity (R. 75). In the boiling house, the juice is clarified, filtered, evaporated to a syrup, crystallized in centrifuges (R. 76–80, 213; 314, 317), and then bagged for storage and shipment (R. 82; 318).

In order to install improved equipment and methods of operation, as well as to repair mill machinery and equipment, the mill is closed down for approximately three months each year (R. 763; 109–111; 114–116; 176).

Transportation and maintenance.—The company operates a railroad, maintains service shops for the repair and overhaul of its field, transportation, and mill equipment, operates a laboratory for testing its products during the course of field and mill operations (R. 103), a plant for the manufacture of concrete products (R. 105), warehouses (R. 84; 106–108), stables (R. 109), a village community, "similar to a typical small town of a farming community center" (R. 776), which houses all but 16 of plaintiff's employees (R. 121), and an administrative organization (R. 108).

Waialua's railroad system consists of 56 miles of main line and nine miles of portable track. It is equipped with ten locomotives and 712 cane cars. (R. 59–61.) The company maintains a roundhouse for servicing this equipment (R. 103). As the trial court found, the personnel employed to perform this function are typical railroad employees—locomotive engineer (R. 205–206), locomotive repairman (R. 206–208), and section hand (R. 208–210); they do no farm work (R. 204–212). The investment in the railroad amounts to nearly $800,000 (R. 647).

Waialua also maintains complete shops for prompt minor repair and emergency work and major overhaul (R. 94), which employ upwards of 100 men (R. 94–103). They are housed in several substantial buildings separate from the processing operations in an area up to 300 feet

from the mill (R. 723). Included are a machine shop, welding shop, blacksmith shop, tinsmith shop, cane loading machine repair shop, tractor repair shop, garage, electric shop, carpenter shop, paint shop, and plumbing shop (R. 94–103). The persons employed in these activities are individuals with highly specialized skills—machinists, welders, electricians, painters, carpenters, etc. (R. 94–103). They do no general farm work (R. 94–103).

THE DISTRICT COURT DECISION

The District Court held that "in the conduct of these enterprises, [Waialua] has assumed a variety of functions including those of farmer, carrier, manufacturer, shipper, and operator of village communities" (R. 787). It concluded that "Railroading is not farming or processing, nor intended by the Act to be a part of either" (R. 792), that processing of the cane is a separate function and not a subordinate part of farming (R. 796–7), and that the repair shops are "self-sufficient units, operated, not as an incident to any other operation exclusively or dominantly, but rather as an integral part of the over-all combination of separate enterprises jointly conducted by plaintiff" (R. 803).

On the basis of these findings and conclusions, the District Court entered a judgment with which the Secretary concurs. The court held:

(1) The section 13 (a) (6) exemption is applicable to employees engaged in plowing, planting,

cultivating, fertilizing, irrigating, and harvesting, including transporting the cut cane over the portable track to the main line railroad, but does not include employees engaged in any function or activity beyond that point (R. 789–790);[2]

(2) the section 7 (c) exemption is applicable to employees engaged in operating the processing machinery in the mill and in "activities closely and intimately connected therewith", including repair work during the week-end shut down (R. 798–9), but does not include employees performing any other repair, farming, transportation,

[2] The court held that the following activities *were* exempt under 13 (a) (6): Using a tractor to prepare the field for planting by clearing rocks, weeding, plowing; using a tractor to clear irrigation ditches and to make beds for portable track; burning cane in preparation for harvesting; operating cane loading machines to cut and load cane; operating a tractor to haul cane cars to and from the mainline railroad; picking up scattered cane in fields; bulldozing cane into piles; making minor repairs to field equipment; operating the irrigation system (R. 191, 194, 196, 198, 201, 308–10).

The court held that the exemption was *not* applicable to the employees engaged in the operation of the *mainline railroad* (locomotive engineer (R. 205–6), locomotive repairmen (R. 206–7), section hand (R. 208–9), crossing watchman (R. 210–1)); or in the operation of the *processing mill* (cane cleaner (R. 310–2), crushing plant operator (R. 213), evaporator operator (R. 212–3), centrifugal machine operator (R. 314–6), boiling house emplovee (R. 316–7)); or in the *bagging and warehousing of sugar* (bagger and loader (R. 317–8), warehouse clerk (R. 318–9)); or in the *operation of the utility plant* (boiler fireman (R. 216–8), power plant operator (R. 218–220)); or the performance of *maintenance* and *repair* work (auto mechanic (R. 220–223), welder (R. 223–226), machinist (R. 227–231), tractor me-

maintenance or village maintenance activities;[3] and

(3) an exemption is applicable to any work week in which an employee engaged exclusively in one or more exempt activities, but does not apply to work weeks in which he performed some covered nonexempt work (R. 819).

THE COURT OF APPEALS DECISION

The Ninth Circuit reversed the judgment of the trial court (R. 726). It is difficult to determine from its opinion and orders just what issues were actually decided. The opinion is unclear and the court denied the company's petition for rehearing, stating that no clarification was needed (R. 746–7). It concludes that the proceeding

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chanic (R. 231–235, 273–276), caneloading machine repairman (R. 239–243), blacksmith (R. 243–248), painter (R. 256–257), concrete products operator (R. 257–8), plumber (R. 259–263), carpenter (R. 264–273, 277–8)); or the following *miscellaneous occupations* (clerk-stenographer (R. 319–320), truck driver (R. 235–239, 248–256), road grader (R. 279–283), laboratory technician (R. 285–286), utility clerk (R. 286–288)).

[3] The exemption was held *applicable* to employees performing the following work: weighing incoming cane cars at the mill; operating machinery for moving loaded cars into and empty cars out of the mill (R. 310–1); coupling and uncoupling cars at the mill and collecting car tickets (R. 312); regulating the flow of cane through the crushing mills (R. 313); operating machinery for boiling and crystallizing sugar (R. 213, 314–317); operating machinery for bagging sugar and loading bagged sugar into box cars or nearby warehouses (R. 318); and "cleaning and making minor repairs to boiling house equipment" (R. 213).

must be "dismissed for abuse of discretion in entertaining a petition for declaratory judgment" and "attempting to settle a question of jurisdictional and constitutional construction therein" (R. 740–1). However, the court was unwilling to stop with the jurisdictional grounds in reversing the District Court's judgment in favor of the employees' counterclaim.[4] It expressed its views fully on the question of coverage of agricultural production under the Act, as well as on the agricultural exemptions in general and the section 13 (a) (6) exemption in particular; and the judgment remanded the cause "for proceedings in accordance with this opinion" (R. 746). Having decided that the section 13 (a) (6) exemption for employees "employed in agriculture" applied to the mill and railroad employees, as well as those who worked in the fields, the court found it unnecessary to consider the scope of the exemption in section 7 (c), or the applicability

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[4] Even the order for dismissal of the employer's action for lack of jurisdiction seems to be predicated, at least in part, on the court's view of the issues on the merits. For the court's criticism of the "agreement of all parties and the Department of Labor" that Waialua's employees are "engaged in commerce or in the production of goods for commerce" (R. 726), and its conclusion that the action was "collusi[ve]" in an "attempt to obtain an advisory opinion upon constitutional questions" (R. 747), seem to rest mainly on its belief that Waialua's whole enterprise is outside the scope of the Act because "agriculture is not commerce, interstate or foreign, nor does agriculture affect such commerce in a constitutional sense" (R. 740).

of either section 13 (a) (6) or section 7 (c) to workweeks in which the employee performed some non-exempt activity (R. 746). It, however, left little doubt as to its approach to these questions in emphasizing the "breadth of the exclusion of agricultural workers" (R. 730).

The opinion states that "agriculture is not commerce, interstate or foreign" (citing *United States* v. *Butler*, 297 U. S. 1) even though "most agricultural products eventually get into interstate transportation" (R. 740), and "We hold that a farming operation such as growing the crop or harvesting is not commerce" (R. 742).

On the exemption issue, the opinion declares that the section 13 (a) (6) exemption for employees "employed in agriculture" applies not only to the field workers engaged in plowing, planting, irrigating, harvesting, and other such farming operations, but also to railroad transportation employees such as locomotive engineers, section hands and locomotive repairmen, mill employees engaged in processing the cane into raw sugar, and the welders, machinists, mechanics, blacksmiths, carpenters, etc., working in the separate machine and repair shops. All such activities, said the Court of Appeals, constitute "harvesting" (R. 732). Even if they were not "harvesting," they were performed by a "farmer" or "on a farm" within the scope of the exemption (R. 732).

SUMMARY OF ARGUMENT

I

There is no dispute between the parties, and the Secretary of Labor agrees, that Waialua's employees are engaged in the production of agricultural products for interstate commerce within the coverage of the Fair Labor Standards Act. The ruling by the Court of Appeals below that production of agricultural products is beyond the scope of the Act and the constitutional power of Congress is plainly erroneous. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755; *Wickard* v. *Filburn*, 317 U. S. 111, 118; *Mulford* v. *Smith*, 307 U. S. 38; *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 236–7.

II

The conclusion of the Court of Appeals that *all* of Waialua's employees are excluded from both the minimum wage and overtime requirements of the Act under the exemption for "any employee employed in agriculture" is contrary to this Court's construction of this particular exemption (*Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755), as well as diametrically opposed to the well established principle that "*any* exemption" from the Fair Labor Standards Act must be "narrowly construed." *Phillips Co.* v. *Walling*, 324 U. S. 490, 493; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617;

Powell v. *United States Cartridge Co.*, 339 U. S. 497, 517. [Emphasis added.]

1. While Waialua's field workers are within the scope of the agriculture exemption, the employees engaged in the separate processing plant, in the main line railroad operations, and in the separate machine and repair shops, are typical factory and industrial workers not within the intent or terms of the statutory definition of agriculture, either in its primary or its secondary meaning. See *Farmers Reservoir & Irrigation Co.* v. *McComb, supra.* The fallacy of the Ninth Circuit's ruling lies in its assumption that the mere fact that Waialua is engaged in farming suffices to sweep all of its employees within the exemption, even those working in the separate industrial and non-farming operations. But Waialua is not simply a farmer—it is a hybrid organization engaged in several different enterprises, only one of which is farming. The company no more operates its railroad transportation system, its processing mills, and its repair and maintenance shops, as a farmer, than it engages in growing cane as a processor.

Waialua occupies a position with reference to the agriculture exemption analogous to the relationship of a chain store corporation to the retail establishment exemption. Just as the wholesale functions of the "hybrid" retailer-wholesaler are outside the scope of the retail establishment exemption (*Phillips Co.* v. *Walling*, 324 U. S.

490), so the processing and related functions of a hybrid farmer-processor are outside the scope of the agriculture exemption.

2. The Ninth Circuit's construction of the exemption in the instant case is directly in conflict with the decisions of the First Circuit Court of Appeals with respect to a virtually identical situation in the sugar industry in Puerto Rico. The First Circuit has had no difficulty in recognizing the separate and distinct character of the processing mill and railroad transportation operations. It has held that the mill employees "are typical factory workers or laborers engaged in maintaining industrial facilities" (*Bowie* v. *Gonzalez,* 117 F. 2d 11, at 18), and that the main line railroad transportation employees are engaged in activities "separate and distinct from agriculture" and "incident to milling rather than farming." (*Calaf* v. *Gonzalez,* 127 F. 2d 934; *Vives* v. *Serralles,* 145 F. 2d 552).

Contrary to the statement of the court below, these decisions cannot be distinguished on the ground that the milling and transportation were "either cooperative enterprises or are done by some outside agency." The First Circuit expressly refused to base its decision on this narrow ground, holding explicitly that "there seems no rational basis for saying that simply because the ownership of the mills and the farms is in the same hands that, therefore, those employees who are engaged in an activity which is separate and

distinct from agriculture are exempt from the provisions of the Act" (*Calaf* v. *Gonzalez*, 127 F. 2d at 937–938).

3. The Ninth Circuit's view that the manufacturing, railroad transportation, and maintenance shop employees are engaged in "harvesting" is so plainly untenable that not even Waialua undertakes seriously to support this proposition. The company places its reliance on the secondary meaning of agriculture, which this Court emphasized is "limited to practices performed by a farmer or on a farm," and in addition performed "as an incident to or in conjunction with" the employer's farming operations. None of these conditions is met so far as the employees working in the mill, on the main line railroad, and in the repair shop operations are concerned.

a. These operations are *not* performed by Waialua in its capacity as a "farmer," and plainly the employees so engaged are not farmers. That the occupations of the employees are significant in determining the applicability of this exemption is evident from the wording of the exemption as well as from the basic approach of the whole Act. The Act is pervaded by the idea that what each employee actually does determines its application to him, regardless of the nature of the employer's general business. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571–2; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517,

524. And the agriculture exemption is an "employee" exemption, in contrast to some other exemptions which expressly except an "employer" or an "establishment."

b. Nor is the work of these employees performed "on a farm" in any normal sense of that term. Waialua's growing fields are distinct from the processing plant, the main railroad line, and the repair and maintenance shops, both in physical location and in functional organization.

c. The distinct nature and organization of Waialua's manufacturing and railroad transportation functions also establishes that these are not "practices" performed "as an incident to or in conjunction with" farming operations within the meaning and scope of the exemption. The use of the word "practices" in the second branch of the definition of agriculture, as well as the plain purpose of this exemption, support the view that the exemption was not designed to apply to distinct business enterprises of an industrial nature, which require organization, equipment, and skills quite unrelated to farming.

d. The *Farmers Irrigation* decision establishes that a separately organized function—even such an "indispensable prerequisite for agricultural production" with such "immediacy of the connection" to cultivation as irrigation (337 U. S. at 759, n. 6)—is not within the exemption if performed *off the farm*. The import of this decision

is not limited to a separately incorporated employer. Separate incorporation was of significance in *Farmers Irrigation* because the irrigation function is so immediately connected with the "elemental process" of farming (337 U. S. at 760) that separate incorporation was the main evidence of the distinct and separate character of the activity. But the rationale of the *Farmers Irrigation* decision applies equally where, as in the instant case, there is other evidence of "a clear and definite division of function" (*id.* at 763).

4. Waialua's charge that the views of the Department of Labor on the agriculture exemption "represent a sharp departure from principles long followed by the Department" is plainly untenable. The present views were all adopted by 1943, or some four years before the institution of this litigation, in order to reflect judicial decisions handed down subsequent to the Administrator's initial interpretations. The original interpretations were issued "at a time when, in the nature of things interpretation was tentative, or, if it was not, ought to have been." *Dairymen's League Cooperative Association* v. *Brannan*, 173 F. 2d 57, 65 (C. A. 2), certiorari denied, 338 U. S. 825. Plainly, the long standing administrative interpretations are not to be deprived of persuasive weight, where, as we submit to be the case here, "the second thought of the Administrator was better than his first" (*id.* at 65–66).

5. The court below proceeded on the fallacious premise that the *exemption* is "remedial" legislation and emphasized "the breadth of the exclusion of agricultural workers," ignoring this Court's repeated emphasis on the far-reaching remedial purposes of this Act for which "Breadth of *coverage* was vital to its mission" (*Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 510 (emphasis added)). That this exemption from both minimum wage and overtime requirements was not intended to have the sweeping scope given it by the Court of Appeals is confirmed by the lesser exemptions, from the overtime requirements only, for "processing" of certain agricultural crops under specified conditions. Section 7 (c), discussed in Point III.

III

The employees engaged in the mill in the processing of sugarcane, including repair and maintenance activities in the mill when it is operating, are within the overtime exemption of Section 7 (c). This processing exemption, however, is limited to employees who work in the "place of employment where he [the employer] is so engaged." The trial court therefore correctly held that the exemption does not apply to employees operating the main line railroad, to employees who repair and maintain the railroad facilities, or to employees who repair and maintain mill equipment during the three months'

"off season" when no processing is going on in the mill.

This exemption has long and consistently been construed, both administratively and judicially, as limited to the particular unit or "place of employment" in which the processing operations are carried on, and as not including the entire premises of an employer who is engaged in distinct operations other than processing. This construction conforms to the basic and well settled principle of strict construction of any exemption from this Act. *Phillips Co.* v. *Walling*, 324 U. S. 490, 493.

The trial court's holding that the exemption is inapplicable to employees during the "off season" also accords with the terms as well as the consistent judicial construction of the exemption. When no processing operations are going on, plainly the employees do not meet the statutory language that they be "in" a "place" where the employer "*is* so engaged" (emphasis added).

IV

The District Court correctly held that an exemption was not applicable to any workweek in which an employee performs covered nonexempt work in addition to exempt work. This conclusion accords with the view that has been widely adopted by the courts throughout the years of this Act's operation. It has been recog-

nized that, if more than lip service is to be paid to the principle of strict construction of exemptions from the Act, exemptions cannot be held applicable to an employee or an employer simply because he engages in some exempt work, if he also engages in other work which Congress clearly intended to subject to the statutory standards. Any other interpretation would open the door wide to evasion of the purpose of the Act "to eliminate * * * substandard labor conditions throughout the nation"; it would result in absorbing into the exemptions parts of industries and activities plainly covered by the Act, solely because the same employees or employers happened to engage in several kinds of activities, and it would thus largely defeat the "Breadth of coverage" of this Act which is "vital to its mission" (*Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 510, 516).

ARGUMENT

I

Waialua's employees are engaged in the "production of goods for commerce," within the meaning of the Fair Labor Standards Act

There is no dispute between the parties, and the Secretary of Labor agrees, that production of agricultural products for interstate shipment is interstate commerce within the regulatory power of Congress, and is "production of goods for commerce" within the meaning of the Fair Labor

Standards Act (R. 740, 742). The opposite ruling by the Court of Appeals is clearly contrary to numerous decisions of this Court.

Although the court below recognized that *Farmers Reservoir and Irrigation Co.* v. *McComb*, 337 U. S. 755, held that the production of agricultural crops is production of goods for interstate commerce under the language of the Act, it frankly rejected the decision as a precedent (R. 742). Relying on *United States* v. *Butler*, 297 U. S. 1, 68, the court flatly ignored the subsequent decisions of this Court which have repeatedly upheld the constitutional power of Congress, under the commerce clause, to regulate the production of agricultural commodities destined for interstate movement. See *Wickard* v. *Filburn*, 317 U. S. 111, 118; *Mulford* v. *Smith*, 307 U. S. 38; *Santa Cruz Fruit Packing Co.* v. *Labor Board*, 303 U. S. 453; *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 236–237.

II

The exemption in section 13 (a) (6) for "any employee employed in agriculture" exempts employees engaged in Waialua's farming activities but does not extend to employees working in the sugar mill, operating the railroad, or working in the repair and maintenance shop

Agriculture, as defined in section 3 (f) of the Act, includes (*infra*, pp. 67–68)

> farming in all its branches and among other things includes the cultivation and tillage of the soil * * * the production,

> cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

As construed by the Court of Appeals below, this *exemption* is given the status of "remedial" legislation to be "broadly and liberally" construed (R. 730–731, 831), so that it would extend to all of Waialua's 1,144 employees. The Court would exclude from both the minimum wage and the overtime requirements of the Act not only the field workers engaged in plowing, planting, irrigating, harvesting, and other such ordinary farming operations, but also railroad transportation employees such as locomotive engineers, section hands, and locomotive repairmen (operating or maintaining Waialua's 56 miles of railroad track, 10 locomotives and 712 cane cars), mill employees engaged in processing the cane into raw sugar, and the welders, machinists, mechanics, blacksmiths, carpenters, etc., working in the separate machine and repair shops.

This construction, we submit, is plainly contrary to this Court's decision in *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. 755, relating specifically to the "agriculture" exemption, as well as diametrically opposed to the well established principle that "*any* exemption" from

tion humanitarian legislation must "be *narrowly* construed" and not extended to "other than those plainly and unmistakably within its terms and spirit" [emphasis added]. *Phillips Co.* v. *Walling*, 324 U. S. 490, 493; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617; *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 517. The correct reading of the exemption, as applied to comparable circumstances, has been made by the First Circuit.

1. The whole import of this Court's opinion in the *Farmers Irrigation* case was that the agriculture exemption must be strictly limited to the operations specified in the statutory definition, and is not to be broadly construed to embrace activities which, though "necessary" or even "indispensable" to the specified operations, are not actually a part of agricultural production itself (337 U. S. at 759, 760, 764, 766); nor is the exemption to be extended to "non-agricultural" functions which are not performed on a farm or by farmers, but are performed in separate industrial plants or enterprises by ordinary industrial workers. Such workers as "the maintenance man in a power plant and the packer in a fertilizer factory," the Court said, "are not employed in agriculture, even if their activity is necessary to farmers * * *. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture" (*Id.* at 761–762).

The fallacy in the Ninth Circuit's construction

of this exemption is that the court assumed that the mere fact that Waialua is engaged in farming, in its capacity as a sugarcane grower, suffices to sweep all of its employees within the exemption, even those employees working in industrial and nonfarming operations and employed by the company in its capacity as a manufacturer or processor. The realistic fact here is that Waialua is not merely a farmer—it is a hybrid organization engaged in several different enterprises, only one of which is farming. In its over-all operations, Waialua cannot properly be described simply as a farmer or grower; it functions as an industrial processor as well as in the capacity of a farmer. Its processing mill and railroad transportation operations, like the power plant and fertilizer factory referred to in the *Farmers Irrigation* opinion, are separate industrial functions, not "agriculture" (337 U. S. at 761–762).

The mere fact that the latter operations are not carried on by a separately incorporated employer is not, we believe, sufficient basis for ignoring the actual separate character of the mill and transportation operations. The independent incorporation of the company was significant in the *Farmers Irrigation* case because the irrigation function is one of those activities so immediately connected with and indispensable to "the *elemental* proce s of planting, growing and harvesting crops" (emphasis added, 337 U. S. at

760, also 759 n. 6)—*i. e.*, a function so immediately connected with farming in its *primary* sense—that the independent incorporation of the employer is about the only evidence of its separateness. But the separateness of other operations less closely connected with farming is plainly evident even in the absence of a separately incorporated employer. Here, as the trial court's findings show, "there is a clear and definite division of function" (337 U. S. at 763) without the demarcation line of independent incorporation.

Waialua is admittedly a "farmer" in its sugarcane growing operations, and the mere fact that it is a large grower does not, of course, affect the availability of the exemption insofar as it is in fact engaged in farming. But obviously Waialua is something else in addition to being a grower—it also engages in separate and extensive industrial processing operations of the same character as similar independently operated processing mills. In law as well as in commonsense, the employees in these non-farming operations are no more "farmers" or employed by a "farmer" than are employees working in a processing plant operated independently by an employer not engaged in farming. Waialua no more operates its railroad transportation system, its processing mills, and its repair and maintenance shops as a farmer than it engages in growing cane as a processor. The former operations are patently even more "separate and independ-

ent productive functions" (337 U. S. at 761) than was the irrigation function in the *Farmers Irrigation* case.

The short of it is that Waialua occupies a position with reference to the agriculture exemption analogous to the relationship of a chain store corporation to the "retail * * * establishment" exemption provided in section 13 (a) (2). This Court has held that "most chain store organizations are * * * of a hybrid retail-wholesale nature," and has denied the "retail * * * establishment" exemption to central offices and warehouses performing wholesale functions, even though their wholesale services are restricted to exempt retail outlets owned and operated by the same company. *Phillips Co.* v. *Walling,* 324 U. S. 490, 495. Just as the wholesale functions of a "hybrid" retailer-wholesaler are outside the retail establishment exemption, so the processing and related functions of a hybrid farmer-processor are outside the scope of the agriculture exemption.

2. Faced with a comparable situation in the sugar industry in Puerto Rico, the First Circuit, with no hesitation, has declared the "agriculture" exemption inapplicable to the distinctly nonfarming operations of the growers, in holdings which are directly in conflict with the ruling below. *Bowie* v. *Gonzalez,* 117 F. 2d 11; *Calaf* v. *Gonzalez,* 127 F. 2d 934; and *Vives* v. *Serralles,* 145 F. 2d 552.

In these three cases, the First Circuit held that the mill and railroad transportation employees of a sugar producing and processing enterprise are within neither the terms of, nor the reason for, the "agriculture" exemption. The mill employees, said the First Circuit, "are typical factory workers or laborers engaged in maintaining industrial facilities." *Bowie* v. *Gonzalez,* 117 F. 2d at 18. And the employees "engaged in the operation, repair, and maintenance of the company railroad" are engaged in activities "incident to milling rather than to farming and therefore [are] not exempt under the Act." *Calaf* v. *Gonzalez,* 127 F. 2d at 936–937; *Vives* v. *Serralles,* 145 F. 2d at 554:

> The mere fact that in this case the owners of the farms are also the owners of the mill and the transportation facilities does not make transportation an incident to farming.
>
> * * * There seems no rational basis for saying that simply because the ownership of the mills and the farms is in the same hands that, therefore, those employees who are engaged in an activity which is separate and distinct from agriculture are exempt from the provisions of the Act. [*Calaf,* 127 F. 2d at 937–938.]

Contrary to the statement of the court below (R. 737–738, fn.), these decisions cannot be distinguished on the ground that the milling and transportation were "either cooperative enter-

prises or are done by some outside agency." In the *Calaf* case, the First Circuit expressly refused to base its decision on the fact that the railroad facilities were owned and used jointly by several growers, stating that "We place our decision * * * on the broader ground that the transportation * * * is incident to milling rather than to farming." 127 F. 2d at 936–937. Similarly, in the *Bowie* case, although some of the cane processed by defendant was grown by outside producers, the decision rested also on the independent ground that mill employees were "typical factory workers" beyond the terms and intent of the exemption. (117 F. 2d at 18.) And the last of the decisions (*Vives* v. *Serralles*), which reaffirmed the *Bowie* and *Calaf* decisions, involved a single business organization which, like the Waialua Company here, operated all the farm lands, the transportation facilities, and the mill. No later decision of the First Circuit has modified these pertinent holdings.

Despite Waialua's assertion (br., p. 59), the First Circuit's decision in *Vives* v. *Serralles,* 145 F. 2d 552, does not hold that hauling and processing employees are within the exemption when they are hauling or processing sugarcane grown by their employer. That decision leads to just the opposite result. It reaffirmed the principle enunciated in the *Calaf* case (127 F. 2d 934), ***supra,*** that "transportation * * * is incident to milling rather than to farming," (*ibid.* at 554), but held

the principle inapplicable where the activities under consideration "begin at a point when the sugarcane has been cut in the field and continue ***up to*** the concentration point" (*ibid.* at 555, emphasis added). It is at and after this "concentration point" that the situation in the instant case arises. It is the Secretary's view, as the trial court held, that the section 13 (a) (6) exemption *is* applicable to the employees who haul the cane *to* the main line railroad, but that, as stated in *Vives* v. *Serralles, supra,* at 554, employees "engaged in the operation, repair, and maintenance of the company railroad," after "concentration," are not within the agricultural exemption.

In *Vives* v. *Serralles,* the "concentration point" is fixed with reference to the three types of transportation that were used on the growing fields. One of these types was practically identical with the transportation system used in the case at bar. It is described by the court as follows (145 F. 2d at 553):

> The cane is hauled to the concentration point in various ways; in small railroad cars pulled by oxen over portable tracks to a siding or switch where the cars are picked up by locomotives operated on the permanent tracks; * * *.

Except for the irrelevant detail that the company here used tractors rather than oxen in that part of the transportation which occurred in the grow-

ing fields over portable tracks, Waialua's system of rail transportation is identical (R. 57).

The reasons which led the First Circuit, in *Serralles,* to fix the point at which the portable tracks meet the permanent tracks as the dividing line between activities which are exempt under section 13 (a) (6) and non-exempt activities are equally applicable to the case at bar. It was there pointed out that the wages of laborers in the field engaged in operations up to the "concentration point" could be regulated by the Secretary of Agriculture under the Sugar Act of 1937 (50 Stat. 903, 7 U. S. C. 1100 *et seq.*). The need for a clear dividing line between the coverage of the two Acts, therefore, suggested the "concentration point" as an appropriate point of cleavage. The fact that this point also marked the end of the "harvesting" operation—according to the Administrator's interpretation and the view of the court—was regarded as decisive. These facts and considerations are, of course, the same in the present case.

3. The error in the view taken by the Ninth Circuit is particularly evident from its conclusion that the manufacturing, transportation, and maintenance employees are engaged in "harvesting" within the primary meaning of agriculture. See the court's statement that the trial court should have found that every "employee at the mill was engaged in 'harvesting' an agricultural product" and that "any activity of any employee

which assisted in this operation, whether furnishing power to the mill or hauling cane from field to mill, fell within the express word 'harvesting' used in the enactment." (R. 732.) Not even Waialua undertakes seriously to support this aspect of the Ninth Circuit's opinion (br. pp. 35*ff*). Plainly, these operations are not "the cultivation and tillage of the soil" or "production, cultivation, growing, and harvesting," within the "primary meaning" of the statutory definition of "agriculture" (see *Farmers Irrigation,* 337 U. S. at 762–766). Manufacturing sugar and railroad transportation are obviously even less a part of "harvesting," "in any normal use of the term" (*ibid.*), than irrigation is a part of agricultural "production."

Waialua, therefore, necessarily must place its reliance on the second and broader meaning of "agriculture" in section 3 (f). But, as this Court emphasized in the *Farmers Irrigation* decision (*id.* at 766), this part of the definition is "limited to practices performed by a farmer or on a farm," and in addition must be performed "as an incident to or in conjunction with" the employer's farming operations. As we have already suggested, none of these conditions are met with respect to Waialua's employees working in the mill, in transportation, and in repair and maintenance operations.

a. As noted above, Waialua's manufacturing, transportation, and maintenance and repair func-

tions are not performed by Waialua in its capacity as a farmer. Even if it were assumed that the exemption includes the work of employees who do no farming but are merely employed by farmers, this condition would not be met here because the workers are employed, not by a farmer, but by a hybrid organization in its other nonfarming capacities. Compelling confirmation of this conclusion is found in the nature of the occupations of the particular employees. These men are not farmers and do not work for a farmer. They are, as described by the First Circuit, "typical factory workers or laborers engaged in maintaining industrial facilities." See *Bowie* v. *Gonzalez,* 117 F. 2d 11 at 18. They are factory workers operating cane cleaning machines, crushing plants, evaporators, centrifuges, steam turbines and electric generators; locomotive engineers, section hands and locomotive repairmen; welders, machinists, mechanics, blacksmiths, carpenters, painters, etc. working in separate machine and repair shops. These employees are not employed by the company in its "farming" aspect but in its industrial and other capacities. And workers such as these are not within the purpose and scope of the agriculture exemption. As stated by the First Circuit in the *Bowie* case (117 F. 2d at 18):

> * * * it would seem that the employees involved in this case would not fall with-

> in the reason for the exemption which was accorded to agricultural employees. The Act was drawn not to include the latter because agricultural labor was not subject to the usual evils of sweatshop conditions of long hours indoors at low wages. Also any attempt to regulate agricultural wages would present a difficult problem since a substantial part of the agricultural workers' income must of necessity be for board and room. The employees in the instant case are typical factory workers or laborers engaged in maintaining industrial facilities. The exemption of agricultural labor from the operation of the Act is not admissible as an argument to exempt labor in an industry from its operation. *Fleming* v. *Hawkeye Pearl Button Co.*, [113 F. 2d 52 (C. A. 8)]; cf. *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 9 Cir., 1940, 109 F. 2d 76, 80–81. For these reasons we reject the appellants' contention that the employees here involved are engaged in agriculture within the meaning of Section 13 (a) (6) and Section 3 (f).

Moreover, the critical significance of the occupations of the *employees*, in determining the applicability of this exemption, is evident from the wording of the exemption as well as from the basic approach of the whole Act. The exemption here is for "any employee *employed in* agriculture" (emphasis added), just as the general cov-

erage of the Act applies to "employees * * * engaged in commerce or in the production of goods for commerce" (sections 6 and 7), and therefore "is dependent on the character of the employees' work," not on the employer's general business. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571–2; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524. As aptly stated by the Fifth Circuit respecting a similarly worded exemption for "employees *employed as* seamen" (emphasis the court's):

> The italicized words mean something; they are not mere tautology. They warn us to look to what the employees do, and not to rest on a mere matter of a name, or the place of their work. *The entire Act is pervaded by the idea that what each employee actually does determines its application to him.* He himself must be engaged in commerce, or in producing goods for commerce, to come under the Act; and in most of the exemptions, as in this one, what he does is expressly made the test of exclusion [emphasis added in this quotation, *Walling* v. *W. D. Haden Co.*, 153 F. 2d 196, 199, certiorari denied, 328 U. S. 866].[5]

[5] When Congress wished to exempt employees of a particular type of *employer* or of an organization, it clearly expressed this intention by use of the word "employer" or "establishment." Thus, sections 13 (a) (9), 13 (a) (12), 13 (b) (2), and 13 (b) (3) exempt employees of a local street car or bus "carrier," "of an employer engaged in the business of operating taxicabs," of an "employer" subject to Part I of the Interstate Commerce Act, and of a "carrier" by air subject to the provisions of Title II of the Railway Labor Act, respectively; sections 13 (a) (2) and 13 (a) (4) exempt employees in a local retail or service "establishment."

Similarly, whether or not an employee is exempt under section 13 (a) (6) depends upon whether *he* is individually employed in "agriculture" and not whether his employer is to some extent engaged in agriculture. The fact that the employees through whom Waialua carries on its farming are within the exemption for employees "employed in agriculture" does not lead to the conclusion that its employees who manufacture raw sugar and operate its railroad transportation system are also within that exemption. It is plain, we submit, that the mill, railroad transportation, and repair shop work is not performed "by a farmer".

b. Nor is the work of these employees performed "on a farm" in any normal sense of that term. Obviously, the whole of Waialua's 9,663 acres is not a "farm", and it is a misuse of that term to include within its scope the areas set apart for industrial, railroad, and comparable nonfarming activity. The fields on which the sugarcane is grown are distinct from the areas allotted to the processing plant, the main railroad line, and the repair and maintenance shops (R. 721, 723). The buildings in which the milling operations are carried on, and the maintenance and repair shops, are on grounds distinct from the growing fields (R. 721, 723, 66–82). The mainline railroad (as distinguished from the portable track) is not laid on the growing fields (R. 59–63). The fortuitous fact that these areas

may be contiguous with the farming portion of the company's property cannot conceal the separateness of activity which would be plain even to Waialua if there were intervening land.

c. The distinct nature and organization of the manufacturing and railroad functions also establishes that these are not "practices" performed "as an incident to or in conjunction with" farming operations within the meaning and reach of the exemption. The use of the word "practices" in the second branch of the definition of "agriculture" is itself a strong indication that the exemption was not intended to apply to distinct industrial functions not ordinarily performed by a farmer or on a farm. "Practices" suggests, rather, activities which are normally carried on by farmers as an incident to and in conjunction with their ordinary farming activities.

Here, on the other hand, as stated by the trial court, "The mill operations are so conducted as to assume the character of a distinct business enterprise of an industrial nature" (R. 796), and the main line transportation activities are separate and distinct from the field activities (R. 792). Organizationally, the functions are separated; the farming operations are performed through a field department (R. 633–4, 643) headed by a field superintendent; the processing, transportation, and repair operations are performed through a factory and shop department headed by a factory superintendent (R. 633–4, 643). Manufacturing and

transportation operating charges are segregated from those concerned with farming (R. 178). The mill is operated by a separate work force which "does no work in the fields" (R. 796–7). Both the main line transportation and manufacturing activities require organization, equipment, and skills quite unrelated to farming. As the trial court found:

> A separate work force is employed for the processing operation in the mill; it does no work in the fields; it is paid in accordance with a scale of hourly rates which are different and distinct from the system used, partly at contract rates and partly at hourly rates, to pay farm labor [R. 796–7].
>
> * * * * *
>
> Railroad operation is a systematic business calling for the employment of skilled, experienced men, trained to quick, keen perception (not farm hands or mill hands) for handling locomotives and moving cars (not the goods in transit), and for the maintenance of roadbed, track and structures, and roundhouse care and servicing of locomotives—all specialized technical work [R. 792].

Waialua asserts that its substantial activities in operating the mill, running the railroad, and providing the repair and maintenance services do not distinguish it from farmers generally since "every farmer" is a "carrier" and a "manufacturer", in addition to being a farmer, because he "hauls his products from the fields to storage"

or to market after transforming the product he grows "into marketable condition," (br., p. 38). But what the company fails to recognize is that while farmers generally have barns, silos, and wells (br., p. 39), Waialua has elaborate industrial and railroad facilities (R. 721–723) not to be found on the ordinary farm. Some farmers may engage in processing or transportation activities through employees who normally work at tilling the soil, but Waialua performs these functions through a separate organization (R. 633–4, 643) and employs a large number of specially skilled craftsmen who do no farming at all (R. 790, 802). The differences between the two situations are so great as clearly to require different treatment. The First Circuit has pointed out the line of demarcation and the reasons for the difference. See *supra*, pp. 28–31.

d. Waialua also relies on a footnote (br., pp. 56–7) in this Court's decision in *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, 766, n. 15, in which it was pointed out, "although not relevant [there]," that the exemption includes an additional requirement that the practices be incidental to "such" (the employer's own) farming. The gist of this footnote was that processing is not incidental to or in conjunction with "such" farming if the crop was produced by other farmers. In making this point, the opinion states that the processing in that situation "is incidental to or in conjunction with the farming operation

of the other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done."

We do not believe, however, that such an inadvertent collateral remark made in the course of a dictum on another point, which was itself described as "irrelevant," can be blown up, by the tenuous process of negative inference, into any substantial support for the conclusion that, if the crop is produced by the processor, then processing it is necessarily "incidental to or in conjunction with" the employer's farming. Indeed, the very case cited by the Court in that footnote—*Bowie* v. *Gonzales*, 117 F. 2d 71 (C. A. 1)—held that the work of mill and railroad employees was not incidental to or in conjunction with the employer's farming, whether or not the processing was limited to crops produced by the same employer. And the whole text of the *Farmers Irrigation* opinion makes it plain that there are important other considerations and conditions (*supra*, pp. 24–27). This provision of the exemption, as that opinion explicitly points out, was not designed to exempt separately-organized *off the farm* operations. Apart from incidental practices performed *by a farmer*, its purpose was to exempt only "*on the farm*" operations, such as wheat threshing, even though performed as a separately organized function:

> * * * As originally introduced, the exemption covered such [incidental] practices

> only if performed by a farmer. On the floor of the Senate it was objected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. To take care of the situation the words "or on a farm" were added to the definition. Thus, the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming *and was done on the farm*. In the face of this careful use of language, we are required to limit the exemption as Congress intended it should be limited, to practices performed by a farmer or on a farm * * * [emphasis added, 337 U. S. at 767].

The *Farmers Irrigation* decision itself demonstrates that a separately-organized function—even such an "indispensable prerequisite for agricultural production" with such "immediacy of the connection" to cultivation as irrigation (337 U. S. at 759, n. 6)—is not within the exemption if performed *off the farm*.

4. Waialua's brief in opposition in No. 357 erroneously states that the views of the Department of Labor with respect to the interpretation of the agriculture exemption "represent a sharp departure from principles long followed by the Department" (br. in opp. p. 19, n. 14). In fact,

however, the present views were adopted long before this case arose, and represent long-standing positions of the Department. Counsel for the company rely on a provision of an Interpretative Bulletin issued in 1939. But, as Waialua's brief itself notes (br. p. 62), in September 1941 the Administrator of the Wage and Hour Division issued a press release (1942 Wage Hour Manual p. 408), stating that in the light of the decision in *Bowie* v. *Gonzalez,* 117 F. 2d 11 (C. A. 1), it appeared "that the exemption for agricultural employees provided by the Wage and Hour Law does not apply to sugar mill employees, even if the only cane ground in such a mill is cane grown by the sugar mill owner on his own field," and that "the Wage and Hour Division went too far in expressing" such view in Interpretative Bulletin No. 14, issued in 1939. Thus, this view of the Administrator was adopted *six years* before the institution of this suit in 1947.

Other modifications relating to transportation of the sugar cane on the main line railroad were adopted in 1943 to accord with the decision in *Calaf* v. *Gonzalez,* 127 F. 2d 934 (C. A. 1). These were also adopted long before this action was begun. During a proceeding of the Industry Committee incident to the approval of the Wage Order Part 635, for the Sugar and Related Products Industry, 8 F. R. 7098, 1944–45 WH Manual 347, the Administrator, in

his findings and opinion dated May 20, 1943, specifically called attention to the decision in *Calaf* v. *Gonzalez*. He construed it as holding the section 13 (a) (6) exemption "inapplicable to employees engaged in transporting sugar cane from their employer's farm to their employer's sugar mill, even though the cane was grown by the employer of the employees in question." Since Waialua, as a member of the Hawaiian Sugar Planters Association, was represented at the hearing, it appears that the company had notice of this change.[6]

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[6] There was at that time no requirement, such as now exists under the Administrative Procedure Act (c. 324, § 3, 60 Stat. 237, 238, 5 U. S. C. 1002b), that such changes be published in the Federal Register.

Further indication that the Department's position was adopted long before this litigation was contemplated is to be found in an unpublished letter written by William B. Grogan, acting for the Administrator, to Mr. Paul E. Guillot, Dugas and Le Blanc, Ltd., Paincourtville, Louisiana, dated November 26, 1942:

"It appears that you already have a copy of Interpretative Bulletin No. 14. The first 13 paragraphs of that bulletin set forth the Administrator's interpretation of the scope of section 13 (a) (6) of the Act. However, the recent decision of the United States Circuit Court of Appeals in *Calaf* v. *Gonzales*, 127 F. 2d 934 (C. A. A. 1), indicates that the mere fact that owners of sugarcane farms are also owners of a sugar mill and transportation facilities does not make transportation of the cane from the farms to the mill 'incident to farming' and therefore exempt under section 13 (a) (6). Therefore, your employees engaged in transporting cane from the fields to the mill are not exempt under section 13 (a) (6) of the Act. Except for the qualification just referred to, I believe that the first 13 paragraphs of bulletin

Waialua's brief asserts that these changed interpretations, even though issued in the early years of the Act's operation and long before this litigation began, are not persuasive or entitled to weight because not "contemporaneous construction" (br. p. 62). But surely an administrative interpretation is not deprived of weight because revised to reflect subsequent judicial decisions. As this Court and the Administrator himself have repeatedly cautioned, "the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute" (*Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523), and the Administrator's interpretations, while entitled to great weight, "are not, of course, conclusive, even in the cases with which they directly deal" (*Skidmore* v. *Swift & Co.,* 323 U. S. 134, 139). The Administrator has consistently warned, in the announcement of his interpretations, that they "serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties unless he is directed otherwise by authoritative ruling of the courts or

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14 will enable you to determine which of your employer's employees are engaged in 'agriculture' and therefore within the scope of the section 13 (a) (6) exemption, and thus exempt from both the minimum wage and overtime provisions of the Act."

That this letter may not have come to Waialua's attention prior to this litigation does not mean that it is any the less an accurate representation of the Administrator's interpretation, even at that early date

unless he shall subsequently decide that his prior interpretation is incorrect."[7]

In this connection, we note the very pertinent statement by Chief Judge Learned Hand in upholding a similarly changed administrative interpretation under the Agricultural Adjustment Act in the case of *Dairymen's League Cooperative Association* v. *Brannan*, 173 F. 2d 57 (C. A. 2), certiorari denied, 338 U. S. 825. Judge Hand observed that the original administrative interpretation was issued "at a time when, in the nature of things, interpretation was tentative, or, if it was not, ought to have been. * * * We are satisfied that the second thought of the Administrator was better than his first; and we do not feel bound to accept the early ruling." 173 F. 2d at 65–66.

5. The sweeping interpretation of the agriculture exemption by the Ninth Circuit is not only contrary to long-standing judicial construction of this particular exemption but, as noted above, is premised on a basically erroneous view of the Act. The decision below simply ignores the well settled principles, repeatedly emphasized by this

[7] See, for example, Interpretative Bulletin No. 5, reissued as revised Nov. 27, 1939, "Further Statement as to Coverage of the Fair Labor Standards Act of 1938" (1940 Wage Hour Manual 131). See also Interpretative Bulletin No. 1, "General Statements as to Coverage of the Fair Labor Standards Act of 1938," first issued Sept. 22, 1938 (1940 Wage Hour Manual 129). For more recent reiterations of this caution, see 12 F. R. 4583, 29 CFR, c. V, Sec. 776.0; 15 F. R. 2925, 29 CFR, 1953 Supp., c. V, Sec. 776.0.

Court, that the coverage of this Act, in view of its broad remedial purpose "to eliminate * * * substandard labor conditions throughout the nation" and the statement of its scope "in terms of substantial universality," must be broadly construed; and "any exemption" narrowly construed and limited to those "plainly and unmistakably within its terms and spirit." *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 510, 516–17; *Phillips Co.* v. *Walling*, 324 U. S. 490, 493; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617.

Taking an approach diametrically opposite to this Court's declaration of the broad remedial purpose of the Act for which "Breadth of coverage was vital to its mission" (*Powell* v. *U. S. Cartridge Co.*, 339 U. S. at 516), the Court of Appeals has construed the *exemption* as "remedial" legislation for "the protection to the growers" and emphasized the "breadth of the exclusion of agricultural workers" (R. 730–731). Proceeding on the assumption that "the policy of protection to the growers" implicit in the exemption "is of as much force as that of the protection of general industrial workers" (R. 730), the court concluded that the principle of strict construction of exemptions has no application to interpretation of the agriculture exemption. This fallacious premise, together with the court's equally incorrect ruling that the regulation of agriculture is beyond the scope of the constitutional power of Congress, explains the sweeping decision that not

only workers engaged in farming but all of Waialua's employees engaged in industrial occupations are within the agriculture exemption. The court thus denied both the minimum wage and the overtime benefits of the Act to all of these employees, and found it unnecessary to decide whether any of them might be exempt only from the overtime requirements of the Act under section 7 (c). See Point III, *infra.*

III

The Section 7 (c) overtime exemption for "processing" sugarcane does not extend to employees engaged in repairing and maintaining the sugar mill machinery during the off season, or in operating and maintaining the mainline railroad, or in carrying on comparable activities

Section 7 (c) provides that "In the case of an employee engaged * * * in the *processing* of * * * sugarcane * * * into sugar (but not refined sugar) * * * [the overtime provisions of the Act] shall not apply to his employees in any *place of employment where he is so engaged*" [emphasis added]. This exemption was held by the trial court to be applicable to "the work of employees which takes place in the mill, in connection with the operation of processing machinery and activities closely and intimately connected therewith" (R. 798); and to the work of employees engaged in repair and maintenance activities in the mill during the weekend shutdown (R. 798); but not applicable during the three

months "off season" (R. 801) when the mill is not in operation.[8]

Waialua asserts that the processing exemption is applicable, in addition, to the employees who operate the mainline railroad in transporting sugarcane from the fields to the mill, to employees who repair and maintain the railroad facilities, to employees who repair and maintain mill equipment during the "off season," and to employees who perform such other operations as generating electricity for covered nonexempt uses (br., p. 64).

The Secretary believes that the trial court correctly construed the exemption in accordance with the terms of the statute and the prior judicial decisions.

1. On its face, section 7 (c) is applicable, *first*, only in the case of an employer engaged in a described operation (in the instant case, processing of sugarcane), and, *second,* only as to those of his employees who work in a *"place of employment where he is so engaged"* [emphasis added]. The exemption is not coextensive with *all* of the activities undertaken by an employer who, *inter alia,* engages in the processing of sugarcane. To be within the exemption, the employees must be engaged in the operations described in section 7 (c) (*i. e.*, processing of

[8] The Ninth Circuit found it unnecessary to rule on this question because of its decision that section 13 (a) (6) exempted all Waialua employees (R. 746).

sugarcane), or in operations that are a necessary incident to the described operations and, in addition, they must be working *in* the "place" where their employer is engaged in such processing. On the other hand, the terms of section 7 (c) do not include employees who work in a "place of employment" where their employer is *not* engaged in the actual processing of sugarcane, although the activities at that place may be, in a broad sense, incidental or necessary to such processing.

Waialua argues (br., p. 67) that the "place of employment where it is so engaged" can include its "entire premises." But the "entire premises" covers 9,663 acres (R. 33) on which Waialua functions both as a farmer and a processor, as well as performs various supporting activities (R. 721, 723). The same reasons advanced in Point II to demonstrate that this entire acreage is not a "farm" (*supra*, pp. 25–27, 36–37) make it equally clear that the entire premises cannot reasonably be deemed the "place" where Waialua is engaged in the processing of sugarcane. The company's contention reads out of the exemptive provision the phrase "where he [i. e. the employer] is so engaged" which seems clearly intended to limit the exemption to employees working "in" the particular "place" in which the employer is actually engaged in processing operations. Employees in the mill engaged exclusively in processing sugarcane into raw sugar, of course, come within the exemption. In

a case where several contiguous buildings or areas located on the same premises and operated as a unitary establishment *devoted to the described operations* constitute a single "place of employment," the entire set of buildings or areas are a "place of employment where he is so engaged." On the other hand, where only certain departments, areas, or buildings within an employer's premises are devoted to the described operations, the remaining departments, areas, or buildings cannot be deemed to be part of such "place of employment" without doing violence to the statutory language and the firmly established rules of statutory contruction.

These views are fully supported by an early decision in *Fleming* v. *Swift*, 41 F. Supp. 825 (N. D. Ill., Nov. 1941), affirmed, 131 F. 2d 249 (C. A. 7), which is the judicial authority most directly in point on this issue. The Swift Company was engaged in acquiring and slaughtering livestock and in the processing, manufacturing, and distributing of meat, meat products, and by-products from livestock. Concluding that the description of operations and processes in section 7 (c) places "a functional limitation on the classes of employees for whom an exemption from the overtime provisions may be claimed," the court held that the exemption applied on a department basis and not to defendant's whole plant. (41 F. Supp. at 831.) Thus, the court carved out for exemption only those departments of the meat-

packing plant in which "handling," "slaughtering," and "dressing" operations were performed and held that the portions of the plant devoted to those operations constituted the "place of employment," and that employees in other departments (such as those devoted to meat-curing or sausage-making) were not within the scope of the exemption. To the same effect, see *Colbeck* v. *Dairyland Creamery Co.*, 70 S. Dak. 283, 17 N. W. 2d 262; *Walling* v. *De Soto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.).

2. Waialua oversimplifies the problem when it argues (br., p. 68–69) that if the railroad employees are engaged in operations incident to processing, rather than to farming, then they are necessarily exempt under section 7 (c).[9] Even

[9] Waialua incorrectly asserts that the decisions of the First Circuit (citing *Bowie* v. *Gonzalez*, 117 F. 2d 11, and *Calaf* v. *Gonzalez*, 127 F. 2d 934) assumed that transportation was exempt under section 7 (c). (See Waialua br., p. 68.) Nothing in the court's opinions warrants this conclusion. The *Bowie* case was a suit by the employer for a declaratory judgment that the complete exemptions in sections 13 (a) (6) and 13 (a) (10) applied. The opinions of the district court (*Bowie* v. *Claiborne*, D. P. R. 1939, 1 W. H. Cases 243, 1 Labor Cases (C. C. H.) ¶18, 443, not officially reported), the appellate court, and the disposition of the case do not involve any such assumption as that claimed by Waialua. Only the appellate opinion is published in the *Calaf* case. It certainly contains no express assumption of the type now asserted, and there is nothing to indicate that any overtime hours were worked or overtime compensation sued for, so as to involve any implied assumption as to section 7 (c) in the award of minimum wages. Neither was the problem discussed or decided, even by implication, in *Vives* v. *Serralles*, 145 F. 2d 552

assuming that they all are so engaged, the question still remains whether they work at a "place of employment" where their employer is engaged *in* processing operations. Clearly, most of the railroad employees do not. The train crews (R. 62), section men (R. 62), and crossing watchmen (R. 63), work all along the mainline which comprises some 56 miles of track (R. 60) and borders the entire ocean perimeter of the company's land (R. 721). The hostler and engine wiper perform their work in the plantation roundhouse (R. 63), well removed from the mill (R. 723).

The same considerations are applicable to the repair and maintenance shops. They are located in separate buildings not connected with the mill where processing takes place (R. 723). Besides, those services are not principally for the processing activity, and therefore may not be considered incidental to it. While the percentage varies from shop to shop, the other activities of Waialua account for a majority of the work in each shop. It would appear that a very small, if not negligible, proportion of the work of the cane loading machine repair shop (R. 97–8), the tractor repair shop (R. 98–9), and

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(C. A. 1). The suits of all of the employees but one were dismissed under section 13 (a) (6), and the remaining employee, though held to be exempt from overtime compensation under section 7 (c), was employed in the sugar mill and not on the railroad; in that case, too, no assumption as to the application of section 7 (c) to transportation is involved even by implication.

the tinsmith shop (R. 97), was done for the mill. Only in the electric shop (R. 101) does the proportion equal 50 percent, and even here there is no indication that the work for the mill was segregated in any way (R. 213–216).

3. One of the employees whose status under section 7 (c) is in issue operated the electric generator in the power house (R. 218–220) which supplied electric power for "operations throughout the plantation" (R. 218); this included, of course, the covered and nonexempt railroad, roundhouse, and office (R. 91, 723). Another operated the machinery in the fireroom which produced the steam both to power the electric generator and for use in the mill (R. 216–218).

Even if these employees are regarded as being employed in the "place" where their employer is engaged in processing sugarcane into raw sugar, because that is done in other rooms in the same building (R. 723), the district court was correct in holding the section 7 (c) exemption inapplicable. This is because the duties of these employees included the production of electric power for covered activities of their employer not excluded by this or any other exemption from the overtime compensation provisions of the Act. Where exemptions have been provided for "any employee" of a designated type of employers, the courts have held that, if the employer engages in activities in addition to those which bring him within the exemption, em-

ployees who have duties relating to the non-exempt as well as the exempt phase of the business are not exempt, despite the literal wording of the exemptive clause. Otherwise, an employer within such an exemption could engage in many assorted businesses and claim exemptions for all his employees because one of the businesses happened to be described in section 7 (c) or 13.

Specifically with respect to section 7 (c), courts have held that employees like those engaged here in the production of steam and electric power are not within the exemption. In *Walling* v. *Bridgeman-Russell Co.*, 2 W. H. Cases 785, 6 Labor Cases (C. C. H.) ¶61,422 (D. Minn., 1942, not officially reported), the court was concerned with the application of the exemption in section 7 (c) for "an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products * * *." It was held that the "Section 7 (c) [exemption] does not exempt industries from the overtime provisions of the Act, but only the specific processes therein mentioned," and accordingly that the exemption did not apply to employees, in the same place of employment, who made the steam and generated the power used exclusively for operating equipment and heating and lighting the building where activities described in the exemption and also other related activities not so described were carried on. *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.) also arose under the same portion of section 7 (c)

and likewise involved the application of the exemption to "employees engaged in producing steam, heat and power" for exclusive use in the same building in activities specified in the exemption and related activities not so described. The court held the exemption inapplicable because "Section 7 (c) of the Act does not exempt industries as a whole from the overtime provisions of the Act, but only those specific processes therein mentioned" [50 F. Supp. at 911].

The same principle has been applied to the other so-called "employer" exemptions in the Act. *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C. A. 2), involved employees engaged in the production of electric power for use by their employer in his exempt business as electric railway carrier. Though section 13 (a) (9) exempts "any employee" of such an employer, it was held not to apply to these employees because the power they produced was used in operating nonexempt instrumentalities of interstate commerce as well as the exempt electric railway. Another instance in which a court refused to apply the literal terms of an exemption because to do so would produce a result not fairly within its purpose is the decision of the Eighth Circuit in *Northwest Airlines* v. *Jackson*, 185 F. 2d 74, certiorari denied, 342 U. S. 812. There, the exemption in section 13 (b) (3) for "any employee of a carrier by air" was held not to apply to employees of such a carrier whose duties related to modification of

planes for the Government. Similarly, in *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. A. 4), the exemption in section 13 (a) (2) for "any employee employed in any retail or service establishment * * *" was ruled inapplicable to employees working in the manufacturing phase of the employer's retail establishment. To the same effect, see *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391 (C. A. 6); *Western Union Telegraph Co.* v. *McComb*, 165 F. 2d 65 (C. A. 6), certiorari denied, 333 U. S. 862, *Nelson* v. *Agwilines*, 70 F. Supp. 497 (S. D. N. Y.).

So here, the use of part of the power produced by Waialua's employees in covered and non-exempt railroad and office activities makes the section 7 (c) exemption—restricted to processing sugarcane—inapplicable to these employees.

4. The district court also properly held section 7 (c) inapplicable to employees engaged in mill repair and maintenance work during the "off season," a period of approximately three months each year when processing operations have been definitely suspended and major maintenance and repair activities are undertaken.

While employment in the "place" where the processing is carried on is a necessary condition to the applicability of the exemption, the words "place of employment" are not controlling in themselves. The language is clear that the exempt employees must be employed in a "place" where the employer "*is*" engaged in one of the

processing operations. It is not enough that the "place" is devoted to activities related in some way, or necessary, to processing which may ultimately take place; it is essential that at the time these activities occur the employer *is* engaged in processing. During the "off season," however, when processing operations are completely suspended for a period of three months, it is stretching the statutory language considerably to conclude that the processing operations *are* being engaged in by the company at that time.

The First Circuit only recently reached this conclusion with respect to a similar exemption in *Mitchell* v. *Stinson,* 217 F. 2d 210, 217 (C. A. 1). It concluded that the section 13 (b) (4) exemption for employees "employed in * * * canning" was not applicable to employees employed during the dead season because they "are not parts of the canning process." And in *Maisonet* v. *Central Coloso, Inc.,* 2 W. H. Cases 753, 6 Labor Cases (C. C. H.) ¶61,337 (D. P. R.) (not officially reported) the issue was squarely presented whether employees at a mill processing cane into raw sugar were entitled to receive overtime pay during the dead season. The court held the exemption inapplicable since the employer was not engaged in processing at that time. It noted that the economic conditions with which section 7 (*c*) is supposed to be concerned do not obtain during the dead season, and that the mill could easily spread employment sufficiently during that

period so as to avoid the necessity of overtime work. To the same effect, see *Heaburg* v. *Independent Oil Mill*, 46 F. Supp. 751, 753–754 (W. D. Tenn.), in which the court pointed out that "the 'dormant' season activities * * * such as maintenance, repair, clerical and sales work, while incidental to and connected with the defendant's business of the 'processing of cottonseed' is not 'processing' within the intent of the Act and is not sufficient to bring the employer within the exemption 7 (c) during such period." See also *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S. D. Calif.).

As in the cases cited above, Waialua's three-month "off season" is a period devoted to repair and maintenance work on a vast scale, designed to safeguard its capital investment and for the installation of improvements (R. 763), as well as to insure the uninterrupted functioning of the mill during the harvest season. The assertion by the company (br., p. 65) that section 7 (c) "exempts without time limit" is not inconsistent with our position that "off season" work is nonexempt, for it is clearly implicit in the exemption that it is based on, and limited by, the premise that processing operations are being conducted during the entire period. If they are, then the exemption is an "absolute" year-around one. But where, as here, they are not, then the exemption is applicable, in the language of the

provision, only during such seasons as the employer *is* engaged in processing.

IV

When in the same workweek an employee performs work exempt under either section 13 (a) (6) or section 7 (c) and also covered nonexempt work, he should receive the minimum wage and overtime benefits of the Act

Finally, the Government submits that the trial court correctly held that an employee is entitled to the minimum wage and overtime benefits of the Act for work performed in any workweek in which he performs both exempt and covered nonexempt work (R. 819). The Court of Appeals also considered it "immaterial" to rule specifically on this question (R. 746), because of the sweeping scope it gave to the section 13 (a) (6) agricultural exemption.

Waialua's contention that Congress intended the exemption to apply to an employee in any workweek in which he does not devote a *substantial part* of his time to an activity not exempt (br., p. 83) ignores the decided cases and the established principle of strict construction of exemptions from the coverage of this Act. See *supra*, pp. 23–24, 45–46. Its related contention that a denial of tolerance for nonexempt work defeats the purpose of the exemption (br., p. 84) is particularly untenable inasmuch as the exemptions themselves state both the type of work for which the exemption is designed and a tolerance for related work. Sections 13 (a) (6) and 7 (c)

exempt not only those directly engaged in the operations specifically mentioned, but also others whose work is "incident to or in conjunction with" such operations (section 13 (a) (6)) or who perform incidental work in the same place of employment (section 7 (c)). There is, therefore, no occasion to broaden these exemptions by a further tolerance allowance.

1. The problem has frequently arisen, as in the instant case, where both exempt and nonexempt activities are involved. In cases in which exemptions depend on the particular duties performed by employees, the performance of both exempt and nonexempt activities by an employee in the same workweek has consistently been held to result in the loss of the exemption. *McComb* v. *Puerto Rico Tobacco Marketing Co-op Assn.*, 80 F. Supp. 953 (D. P. R.), affirmed 181 F. 2d 697 (C. A. 1); *Mitchell* v. *Stinson*, 217 F. 2d 210 (C. A. 1); *North Shore Corp.* v. *Barnett*, 143 F. 2d 172 (C. A. 5); *Walling* v. *W. D. Haden Co.*, 153 F. 2d 196 (C. A. 5), certiorari denied, 328 U. S. 866; *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971 (C. A. 2), certiorari denied, 326 U. S. 722; *McComb* v. *Del Valle*, 80 F. Supp. 945, 951 (D. P. R.); *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938, 943 (D. Minn.); *Fleming* v. *Swift & Co.*, 41 F. Supp. 825 (N. D. Ill.) affirmed, 131 F. 2d 249 (C. A. 7); *Walling* v. *Peacock Corp.*, 58 F. Supp. 880, 883

(E. D. Wis.); *Sykes* v. *Lochmann,* 156 Kan. 223, 132 P. 2d 620, certiorari denied, 319 U. S. 753; *Jordan* v. *Stark Bros. Nurseries,* 45 F. Supp. 769 (W. D. Ark.); *Walling* v. *Bridgeman-Russell,* 2 W. H. Cases 785 (D. Minn.), 6 Labor Cases (C. C. H.), ¶61,422 (not officially reported); *Loeb* v. *Ideal Packing Co.,* 7 Wage Hour Rept. 397, 8 Labor Cases (C. C. H.) ¶62,150 (Wis., C. C. Mil. Co., 1944); *Gaskin* v. *Clell Coleman & Sons,* 5 Wage Hour Rept. 581 (Ky. C. C., Mercer Co., 1942).

The operation of this rule in a case involving section 7 (*c*) is well illustrated by *Shain* v. *Armour & Co., supra.* Although the major part of the plant's activities were devoted to the processing of butter and the employer therefore contended that all of his employees were exempt, only those employees "as devote their time *exclusively* to the first processing of cream into butter" were held to be within the exemption (6 Wage Hour Rept. 715, 716). [Emphasis added.] The court specifically denied the exemption to employees who "devote part of their time during the workweek to duties other than the first processing of cream into butter" (*ibid.*). Similarly, in *Walling* v. *Bridgeman-Russell, supra,* section 7 (*c*) was held applicable only to employees "who perform exclusively the operations described in this Section" (2 W. H. Cases at 790), and, once again, the exemption was expressly denied if "during any part of the workweek, the employee

performs duties which do not fall within the scope of the exemption" (*ibid.*).

To the same effect, in cases involving section 7 (c) and section 13 (a) (6) exemptions, see *McComb* v. *Puerto Rico Tobacco Marketing Coop. Assn., supra; McComb* v. *Del Valle, supra; Fleming* v. *Swift & Co., supra; Jordan* v. *Stark Bros. Nurseries, supra; Walling* v. *DeSoto Creamery & Produce Co., supra; Walling* v. *Peacock Corp., supra; Sykes* v. *Lochmann, supra;* and *Loeb* v. *Ideal Packing Co., supra.* For similar rulings with respect to other exemptions, see *Mitchell* v. *Stinson,* 217 F. 2d 210, 217 (C. A. 1) (employees engaged in "canning" within the meaning of section 13 (b) (4), who also were engaged in the nonexempt work of bus driving); *North Shore Corp* v. *Barnett,* 143 F. 2d 172 (C. A. 5) (employee engaged as telephone switchboard operator within meaning of section 13 (a) (11), who also performed other duties of a nonexempt nature); *Anderson* v. *Manhattan Lighterage Corp.,* 148 F. 2d 971 (C. A. 2), certiorari denied, 326 U. S. 722. See also *Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391, 394 (C. A. 6).

Thus, the courts have recognized that if more than lip service is to be paid to the principle that "any exemption from [this] humanitarian and remedial legislation must * * * be narrowly construed" and not extended "to other than those plainly and unmistakably within its terms and spirit" (*Phillips Co.* v. *Walling,* 324 U. S. 490,

493), exemptions cannot be extended to an employee or an employer simply because he engages in some exempt work, if he also engages in other work which Congress clearly subjected to the statutory standards. Any other interpretation would open the door wide to evasion of the purpose of the Act to eliminate substandard labor conditions. It would result in absorbing into the exemptions parts of industries and activities plainly covered by the Act, solely because the same employees or employers happened to engage in several kinds of activities. Such a result would largely defeat the "Breadth of coverage" of this Act which is "vital to its mission" (*Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, 516).

2. The position taken by the courts in the foregoing cases and by successive administrations over a period of years (see Interpretative Bulletin No. 14, par. 37, p. 22) accords with the evident purpose of Congress in defining with extraordinary particularity the scope of the exemptions. Congress did not merely exempt, by section 13 (a) (6), employees "employed in agriculture." It went further, and, in section (3) (f) gave a very detailed definition of agriculture which included not only traditionally agricultural activities but also "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." This language in itself provides a substantial tolerance for activities which are not of a strictly agricul-

tural nature. In addition, Congress provided other exemptions for related processing activities in sections 7 (c) and (13) (a) (10). The legislative history indicates that these exemptions were considered together and were intended to be a comprehensive and exclusive list of the activities in this field which Congress desired to exempt. As the courts have also emphasized, all the sections relating to these exemptions "are in *pari materia* and must be construed together to form a consistent whole, if possible." *Bowie* v. *Gonzalez,* 117 F. 2d 11, 17 (C. A. 1). There is no room for additional tolerances and exemptions.

3. The situations cited by Waialua where the Administrator has allowed a tolerance for nonexempt work are distinguishable from those presented by sections 7 (c) and 13 (a) (6), involved in this case. The instances collected in footnote 1 in Appendix E to Waialua's brief (p. 104) deal with section 13 (a) (1) which expressly grants the Administrator the power to define by regulation certain exempt classifications which are identified in the Act only in the most general terms. As the tolerances are expressly provided in the regulation, no question of judicial interpretation is presented.

The other exemptions cited by Waialua, where the Administrator has allowed and the courts have approved a tolerance for nonexempt work, are cases in which the exempt occupation is designated only by an undefined word, or phrase,

rather than by a precise definition such as is provided in section 3 (f) and in section 7 (c). It was felt that those exemptions were intended to apply to the typical situations or employees designated by Congress and that the related activities normally found in those situations and occupations should not be regarded as defeating the exemptions. Thus, section 13 (a) (2), cited in Waialua's brief (fn. 52, p. 83), exempts employees employed in a "retail * * * establishment." Such establishments generally make a few non-retail sales. A tolerance has therefore been held appropriate. This explains the decisions in *Northwestern-Hanna Fuel Co.*, v. *McComb*, 166 F. 2d 932 (C. A. 8); *Harris* v. *Hammond*, 145 F. 2d 333 (C. A. 5), certiorari denied, 324 U. S. 859; and *Brown* v. *Minngas Co.*, 51 F. Supp. 363 (D. Minn.).

In short, the Department is of the view that the tolerance specifically provided by the particularized language of the agricultural exemptions need not be broadened to accomplish the purposes of these exemptions, whereas the tolerances permitted under certain other sections of the Act are necessary to give substance to those exemptions.

CONCLUSION

The present status of this case is that the counterclaim of the employees has been "left undismissed," but the judgment of the trial court on the merits in their favor has been reversed by the Court of Appeals and the cause remanded "for proceedings in accordance with the opinion of this court" (R. 746–7). And the "opinion of this court" states in no uncertain terms the appellate court's view that the employees' claims should be rejected on the merits, so that there would seem little point either in this Court's remanding the case to the Ninth Circuit with directions "to review on the merits the important issues of statutory construction," as has been suggested by the employer (No. 358, Petition, p. 12), or in allowing the case to go back to the District Court to enter judgment in accordance with the unequivocal views on the merits expressed by the Court of Appeals. Whether or not the issues of statutory construction were technically decided by the decision below, those issues are necessarily presented if the decision is reversed on the jurisdictional issue, as the petitioner in No. 358 urges. To refer the issues on the merits to the Ninth Circuit again would, therefore, serve no purpose except unnecessarily to prolong this already too prolonged litigation, which has been going on for over seven years, having been before both the trial court and the Court of Appeals twice already.

For the above reasons, it is respectfully submitted that the decision and judgment of the Court of Appeals should be reversed and that of the District Court reinstated.

Respectfully submitted.

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FEBRUARY 1955.

APPENDIX

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, are:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with

such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

* * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 7. * * * (c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of

subsection (a) shall not apply to his employees in any place of employment where he is so engaged; * * *

* * * * *

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (6) any employee employed in agriculture * * * or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products * * *.

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